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In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL E. YEAUGER
SERGEANT
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the Confrontation Clause or the Due Process Clause of the United States Constitution requires excluding the out-of-court, oral, unsworn statements of a witness who is available at trial but does not testify during the government's case on the merits.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael E. Yeauger, respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, rendered in this proceeding on October 24, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Yeauger*, 27 M.J. 199 (C.M.A. 1988), is reprinted as Appendix A.

The opinions of the United States Navy-Marine Corps Court of Military Review, *United States v. Yeauger, on remand*, 24 M.J. 835 (N.M.C.M.R. 1987), and *United States v. Yeauger*, 20 M.J. 797 (N.M.C.M.R. 1985) are reprinted as Appendices B and C.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on April 17, 1988. By

summary disposition, that court remanded the case to the United States Navy-Marine Corps Court of Military Review, on November 12, 1986, for reconsideration in light of *Lee v. Illinois*, ____ U.S. ____, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and *United States v. Cordero*, 22 M.J. 216 (C.M.A. 1986). The Court of Military Appeals again granted petition for review on January 22, 1988 and affirmed the decision of the United States Navy-Marine Corps Court of Military Review on October 24, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

10 U.S.C. § 881, Article 81, Uniform Code of Military Justice.

Conspiracy.

> Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

10 U.S.C. § 886, Article 86, Uniform Code of Military Justice.

Absence without leave.

> Any member of the armed forces who, without authority—
>
> (1) fails to go to his appointed place of duty at the time prescribed;
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> (2) goes from that place; or
>
> (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;
>
> shall be punished as a court-martial may direct.

10 U.S.C. § 921, Article 121, Uniform Code of Military Justice.

Larceny and wrongful appropriation.

> (a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—
>
> (1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

10 U.S.C. § 934, Article 134, Uniform Code of Military Justice.

General article.

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

RULES OF EVIDENCE INVOLVED

Mil. R. Evid. 801(d)(1).

Definitions.

Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with

the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

Mil. R. Evid. 803(24).

Hearsay exceptions; availability of declarant immaterial.

[The following are not excluded by the hearsay rule, even though the declarant is available as a witness:]

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Petitioner was convicted by a general court-martial, composed of officer and enlisted members, of unauthor-

ized absence, conspiracy to commit larceny, larceny, and unlawfully receiving and concealing stolen property.[1]

The basis for appellant's prosecution was an alleged conspiracy between appellant, his wife Lynne, and a Sergeant Callahan. Sergeants Yeauger and Callahan managed an enlisted men's club at Camp Pendleton, California, in September and October 1981, during which time two larcenies occurred at that club. Initial suspicion settled upon Sergeant Callahan, but no charges followed. In November 1981, Sergeant Yeauger and his wife, also a servicemember, were transferred to the Marine Corps Air Station, New River, North Carolina for duty. In May and July 1982, larcenies from club facilities at New River occurred. Coincidentally, during this time period, Sergeant Yeauger reported his wife Lynne to the Naval Investigative Service (NIS) for alleged homosexual acts. During Lynne's interrogation by NIS, she implicated appellant and Callahan in the Camp Pendleton thefts. An NIS agent interrogated Sgt Callahan, and, during his interrogation, the agent implied that both Yeaugers had confessed, labelling Callahan the "ringleader." Callahan purportedly confessed, implicating Sergeant Yeauger during the course of an interview that lasted about two or three hours. His statement was never reduced to writing.

It became apparent to the prosecutor that Callahan would recant his confession at his trial (Callahan admitted making the statement, but denied its veracity, stating that a third party had threatened him and his loved ones if he did not confess to NIS). The prosecutor then concluded that Callahan's sworn testimony would not prove his case at Yeauger's trial, so he asked the military judge, during an Article 39(a) session, to admit Callahan's oral, unsworn

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[1] 10 U.S.C. §§ 881, 886, 921 and 934 (1982).

statement as substantive evidence, in lieu of Callahan's live testimony.[2] The military judge stated on the record that he believed Callahan had perjured himself during the Article 39(a) session, and admitted the oral statement pursuant to Military Rule of Evidence 803(24), the residual hearsay rule. The NIS agent, testifying from his memory of an interview conducted some ten months prior, without the aid of written notes, provided his version of Callahan's oral, unsworn testimony to the court members. Later testimony confirmed that the interview was never reduced to writing. The trial defense counsel objected to this violation of Yeauger's constitutional right of confrontation, stating, "I'm being forced to call Sergeant Callahan." Record at 130. Lynne Yeauger then testified, as well as several witnesses who corroborated various portions of Lynne Yeauger's and Callahan's statements.

The Navy-Marine Corps Court of Military Review held that the record presented sufficient indicia of trustworthiness for admission of the oral, unsworn statement. *United States v. Yeauger*, 20 M.J. 797, 802 (N.M.C.M.R. 1985). The court summarily dismissed the confrontation issue, reasoning that the defense ultimately called Sgt Callahan to testify. *Yeauger, supra* at 802. The Court of Military Appeals, after granting appellant's petition for review, remanded the case to the court of military review, for reconsideration in light of *Lee v. Illinois*, ____ U.S. ____, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and *United States v. Cordero*, 22 M.J. 216 (C.M.A. 1986), both decided after the Court of Military Review's action on the case. The Navy-Marine Corps Court of Military Review again affirmed, holding the above two cases inapposite. *United*

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[2] Article 39(a), Uniform Code of Military Justice, 10 U.S.C. § 839 provides for litigation of evidentiary matters in sessions outside the presence of court members.

States v. Yeauger, 24 M.J. 835 (N.M.C.M.R. 1987). The Court of Military Appeals later affirmed, holding the oral, unsworn, pretrial statement admissible under the residual hearsay exception, and concurring in the confrontation analysis provided by the Navy-Marine Corps Court of Military Review. *United States v. Yeauger*, 27 M.J. 199 (C.M.A. 1988).

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO ENSURE MILITARY COURTS COMPLY WITH THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

This case presents an issue not resolved by *California v. Green*, 399 U.S. 149 (1970): whether the government violates due process and the Confrontation Clause when it seeks to admit oral, unsworn, pretrial statements as substantive evidence, rather than calling the declarant as a witness during its case-in-chief.[3]

The Supreme Court expressed the preference for sworn testimony in *Bridges v. Wixon*, 326 U.S. 135, when an alien was subject to deportation on the basis of an oral, unsworn statement.[4] The primary object of the Confron-

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[3] Justice White alluded to the potential due process issue in *Green*, 399 U.S. 149, 163-164, footnote 15. Writing for the majority, he also left unanswered the admissibility of an oral, unsworn statement to a police officer by a declarant who testified but could not remember key facts (identity) due to the influence of the hallucinogen LSD. *Green*, *supra* at 168-170.

[4] Justice Douglas, speaking for the majority, stated: "We may assume [declarant O'Neil's oral, unsworn statements] would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence (citations omitted). So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions

tation Clause was to prevent the use of depositions or *ex parte* affidavits in criminal courts in lieu of live testimony. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

Historically, even sworn depositions were inadmissible if the witness was *present in the courtroom* at the time the deposition was offered, because no need existed to resort to substitute testimony.[5] In a typical case where the central issue is whether the use of hearsay evidence violates the Confrontation Clause, the prosecutor uses a sworn statement from a preliminary hearing or trial because he cannot produce the declarant. Here the prosecutor did not have to cope with the problem of an unavailable witness. He obviously decided that Callahan's testimony would not advance *his* case. His choice was clear—either prove the case with legally competent evidence, or convince the military judge to admit the oral, unsworn statement as residual hearsay pursuant to Mil. R. Evid. 803(24) and, thus, shift the burden of producing the crucial witness to the defendant. This strategy clearly violated concepts of due process and fundamental fairness.

The United States Court of Military Appeals recently explained the rationale behind sparing use of Mil. R. Evid. 803(24):

> According to the legislative history of Fed.R.Evid. 803(24), which corresponds to Mil.R.Evid. 803(24), the residual exception was to "be used very rarely and

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of fairness on which our legal system is founded." *Bridges v. Wixon*, at 153-154. *Bridges v. Wixon* turned on a rule of evidence and the Confrontation Clause issue was not addressed. Nevertheless, the underlying principles of due process apply to that case, and to this case as well.

[5] Cases collected at 5 Wigmore, Evidence § 1415 (Chadbourne rev. 1974).

> only in exceptional circumstances." S.Rep. No. 1277, 93d Cong., 2 Sess., *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7066. Accordingly, all prerequisites for use of the residual exception must be satisfied, unless they are waived by the party against whom the statement is being introduced. (Citations omitted).
>
> It seems clear that not every prior statement by a declarant who "testifies at the trial or hearing and is subject to cross-examination concerning the statement" (Mil.R.Evid. 801(d)(1)) was intended to be admissible under Mil.R.Evid. 803(24). Otherwise, there would have been no point in setting forth the limitations which are contained in Mil.R.Evid. 801(d)(1), since they could always be bypassed.

United States v. Guaglione, 27 M.J. 268 (C.M.A. 1988) (Emphasis in original).

In *Guaglione*, the Court of Military Appeals found prior sworn statements to criminal investigators inadmissible under Mil. R. Evid. 803(24), despite the fact that the declarants testified for the government and were cross-examined by the defense. Clearly, the exposition of legislative history quoted above applies with even greater force to an oral unsworn statement. Congress did not intend that Mil. R. Evid. 803(24) be a vehicle for a prosecutors to introduce such inherently unreliable evidence *in lieu of* a readily available witness. A statement which was not reduced to writing, but merely repeated by a criminal investigator some ten months later is no substitute for the testimony of an available declarant.

Both lower appellate courts disposed of the Confrontation Clause issue merely by observing that Callahan testified. Neither court dealt squarely with the government's strategy in proving its case.

This Court has delineated the similarity in values protected by rules of evidence and the Confrontation Clause:

> Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause.

California v. Green, 399 U.S. 149, 156 (1970).

In this case, the manipulation of the hearsay provisions of the military rules of evidence by the prosecutor clearly raises questions of compatibility with Sergeant Yeauger's constitutional rights to confrontation (and due process). This Court should grant this writ in order to scrutinize this important issue.

CONCLUSION

This Honorable Court should grant the petition for a writ of certiorari.

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 52,775
NMCM 84 2381R

UNITED STATES, APPELLEE

v.

MICHAEL E. YEAUGER, SERGEANT,
U.S. MARINE CORPS, APPELLANT

Oct. 24, 1988

For Appellant: *William J. Holmes, Esq.* (argued); *Commander J.A. Williams, JAGC, USN* (on brief), *Captain David C. Larson,* JAGC, USN.

For Appellee: *Lieutenant Commander Lawrence W. Muschamp, JAGC, USN* (argued); *Captain Wendell A. Kjos, JAGC, USN* (on brief); *Captain Carl H. Horst, JAGC, USN, Lieutenant Commander Jeffrey S. Sawtelle, JAGC, USN, Major E.D. Clark, USMC.*

Opinion of the Court

COX, Judge:

Appellant stands convicted, contrary to his pleas, of the following offenses under the Uniform Code of Military Justice: three specifications of conspiracy to commit larceny; absence without leave; three corresponding specifications of larceny; and receipt of stolen property, in

violation of Articles 81, 86, 121, and 134, UCMJ 10 U.S.C. §§ 881, 886, 921, and 934, respectively.[1]

We granted review to determine:

> WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE THE ORAL AND UNSWORN CUSTODIAL STATEMENT OF SERGEANT E. D. CALLAHAN UNDER RULE 803(24) OF THE MILITARY RULES OF EVIDENCE.

Callahan's statement relates to two of the larcenies and two of the conspiracies; the other Charges and specifications are unaffected.

The case was tried by members. The Government's primary evidence against appellant was the in-court testimony of his estranged wife, Lynne, and the pretrial statement of Callahan.[2] Lynne, a Marine Corps Private at the

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[1] Appellant was sentenced to a dishonorable discharge, confinement for 20 years, and accessory penalties. Pursuant to a recommendation by the Naval Clemency and Parole Board, the Secretary of the Navy reduced the confinement to 10 years. The Court of Military Review affirmed the findings and sentence as reduced. 20 M.J. 797 (1985). On initial appeal to this Court, we remanded the record to the Court of Military review for their reconsideration in light of *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and *United States v. Cordero*, 22 M.J. 216 (CMA 1986)—two opinions that were published after the Court of Military Review's decision. On remand, the Court of Military Review again affirmed. 24 M.J. 835 (1987). That court concluded that those two opinions, involving admissibility of statements of declarants unavailable for cross-examination, were not applicable. It is the appeal of this decision that is presently before us.

[2] There was also a quasi-admission by appellant to one of his coworkers, Staff Sergeant J.W. Rothrock, who testified:

> I was curious because there was a rumor going around that Sergeant YEAUGER had something to do with it [the larcenies]. I was curious and I asked him one night when we were out there

time of appellant's trial, testified in considerable detail about how appellant and Callahan had plotted and carried out the two larcenies under review. She testified under a grant of immunity and had already been convicted, in accordance with her pleas, for her role in two other larcenies (the larceny-conspiracy and receiving offenses of which appellant was ultimately convicted that were not connected with Callahan's testimony).

Lynne's statements and later testimony against appellant came about only after he had reported her to military authorities for her admitted lesbian activities. Initially, Lynne accused only appellant of the two larcenies; later she included Callahan. Based on Lynne's statements, appellant and Callahan were questioned. Appellant asserted his rights and declined to make a statement; however, Callahan took the bait.

The agents told him (or at least implied) that *both* Yeaugers had confessed and implicated Callahan as the ringleader. To convince Callahan, they showed him—but did not allow him to read—Lynne's written confession and appellant's rights-warning form (which appellant had indeed signed in asserting his rights). According to the agents, Callahan thereupon capitulated and described in detail the actions leading up to and culminating in the offenses. This statement conforms in all significant details with the testimony and statements given by Lynne.[3] It is admission into evidence of this oral, unsworn statement that is in issue.

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if he did it, and he said, "I'm not going to say yes or no, but I told you, you know, somebody would get them back," or joking, "Ha, ha, it serves them right," or something like that.

[3] Since, by both Lynne's and Callahan's accounts, Lynne was not present at the scene of the crimes, Callahan's account goes well beyond Lynne's in describing the details of the events.

At appellant's trial, Callahan testified both on the foundation of the statement and on the merits. His position was that he admitted making the statement to the agents but claimed that it was not true. Evidently the factfinder at his own trial, where he tried the same story, was no more impressed because he was convicted for his role in the offenses. At appellant's trial, Callahan testified under a grant of immunity as a defense witness.

Callahan's explanation for his statement was that he was subject to two different pressures:

First, he claimed to have been unlawfully threatened and coerced by the investigating agents. Based upon substantial evidence to the contrary, the military judge rejected this assertion.

Second, he claimed to have been threatened by a mysterious blond stranger. The latter threat allegedly came about in the following manner:

Approximately 4 days before the fateful interview with the agents (a year and a half after the offenses and a continent removed), Callahan received an anonymous phone call threatening his life and that of his lady friend and his daughter. The caller ordered Callahan to meet him at a certain shopping mall 2 days later, which Callahan did. There, he encountered the blond stranger who reiterated the threat and provided him with the story he was to give the investigators should they contact him. This story included the accusation against appellant and admission of Callahan's own involvement in these serious felonies.

Two days later, Callahan was indeed questioned by law enforcement personnel. Rather than mentioning the threat, he confessed to the offenses, as purportedly directed by the stranger, and implicated appellant. Apparently, the first time this alleged threat was brought to the attention of anyone in authority was at Callahan's own court-martial, where it also flopped.

Appellant did not testify on the merits in his trial. The primary thrust of the defense case was Callahan's denial of criminality and an attempt to establish an alibi for him.

The military judge admitted Callahan's statement under the residual hearsay provision, Mil.R.Evid. 803(24), Manual for Courts-Martial, United States, 1969 (Revised edition) (*see infra*), after hearing Callahan's and the agents' versions of the events. The judge found Callahan's trial testimony—*i.e.*, his recantation of his prior admission and the blond-stranger story—to be "incredible" and the agents' account to be "trustworthy." The judge did not rule that the factfinder had to believe Callahan's admission but said:

> I'm simply saying that there's enough trustworthiness surrounding what he [Callahan] said on that day to be presented to the factfinders. They can decide whether or not it's consistent with what Mrs. YEAUGER has to say whenever she comes to testify and whatever else the Government presents.

The Court of Military Review agreed with the military judge. With respect to the central question of trustworthiness, the court placed emphasis on the availability of both Callahan and the agents for cross-examination; the general similarity of the statement to another hearsay exception (Mil.R.Evid. 804(b)(3) and nonhearsay (Mil.R. Evid. 801(d)(1)(A))[4]; the circumstances surrounding the giving of the statement; the corroborating facts in evidence; the patent incredulity of Callahan's recantation; and Callahan's own validation of the fact of the prior statement. The court also noted that Callahan's presence and testimony precluded a confrontation-clause violation. 20 M.J. 797, 801-02 (NMCMR 1985).

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[4] *Cf. United States v. Quick*, 26 M.J. 460 (CMA 1988).

On remand,[5] the Court of Military Review reiterated its holding that Callahan's statement had "sufficient circumstantial guarantees of trustworthiness . . . to warrant admission . . . under MRE 803(24)," noting again that the cases addressing statements not subject to confrontation were inapposite. 24 M.J. 835, 839 (NMCMR 1987). We agree.

Mil.R.Evid. 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * *
>
> (24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

There is no issue with respect to factors A through C or with the notice requirement. These criteria were resolved in the Government's favor by the military judge and confirmed by the Court of Military Review; we have no occa-

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[5] *See* n. 1, *supra*.

sion to review them here. All that's in issue now is application of the criterion that the statement be one "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness."

Those foregoing exceptions include: present sense impression; excited utterance; then existing mental, emotional, or physical condition; statements for purposes of medical diagnosis or treatment; recorded recollection; records of regularly conducted activity; absence of entry in records of regularly conducted activity; public records and reports; records of vital statistics; absence of public record or entry; records of religious organizations; marriage, baptismal, and similar certificates; family records; records of documents affecting interest in property; statements in documents affecting interest in property; statements in ancient documents; market reports and commercial publications; learned treatises; reputation concerning personal or family history; reputation concerning boundaries or general history; reputation as to character; judgment of previous conviction; judgment as to personal, family or general history, or boundaries.

Once proffered evidence meets the foundational requirements for any of these exceptions, it is admissible without independent judicial certification of reliability. It is then for the factfinder to decide how much, if any, weight to accord it. Not infrequently, factfinders disregard such evidence entirely, usually for self-evident reasons. Thus, inclusion within one of these categories is not conclusive of reliability. By the same token, a guarantee of reliability is not necessary for a statement to be "equivalent" to such an exception.

In the instant case, if Callahan had not testified at appellant's trial, his prior statement almost certainly would have failed the "equivalent circumstantial guaran-

tees of trustworthiness" standard. Apart from the obvious confrontation problem, the statement itself would have to be viewed as "presumptively unreliable" due to its blame-spreading content. *E.g., Lee v. Illinois,* 476 U.S. 530, 545, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514 (1986); *United States v. Dill,* 24 M.J. 386 (CMA 1987).

Even the fact that the statement interlocked with Lynne's may not, of itself, have saved it. It is one thing to say that a hearsay statement of a coactor that interlocks with that of the *accused* may be reliable. *See Cruz v. New York,* 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); *United States v. Dill, supra* at 388 n. 5. However, an accusatory statement of one coactor that only interlocks with the accusatory testimony or statement of another coactor is generally less trustworthy vis-a-vis the accused. Still, such corrobration, especially given the antithetical positions of the witnesses here, is another factor for the judge to consider.[6]

Adding to the mosaic of reliability was the solid coincidence of Callahan's statement with the physical evidence found at the scene of the offenses. In addition, Callahan himself testified, *see United States v. Powell,* 22 M.J. 141, 145 (CMA 1986) (Everett, C.J., concurring), with the result that the court was able to scrutinize his demeanor, along with that of the other witnesses.

What ultimately separates this case from *Dill,* however, is Callahan's voucher for the making of the prior statement, coupled with his cock-and-bull explanation for it. Under these circumstances, the logical inference is that the

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[6] In addition, it does not appear that Callahan's statement was merely dragged out through a series of monosyllabic responses, utilizing Lynne's statement as the script. First, as indicated (n.3, *supra*), his statement went much further than Lynne's in many particulars. Second, even Callahan admitted that the genesis of the story was the blond stranger.

prior statement was much closer to the truth. Also, it is not insignificant that Callahan's pretrial statement was decidedly self-incriminating as to himself.

In sum, it appears that the military judge carefully balanced many factors relating to trustworthiness, and he arrived at a defensible conclusion. *See United States v. Hines,* 23 M.J. 125, 135-36 (CMA 1986). We agree that the statement was admissible and subject to such valuation as the factfinder deemed appropriate.[7]

The decision of the United States Navy-Marine Corps Court of Military Review on remand is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

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[7] This case does not stand for the proposition that prior inconsistent statements admitted for impeachment purposes under Mil.R.Evid. 607 will meet the "reliability" test required for admission as substantive evidence under Mil.R.Evid. 803(24). Each proffer must be evaluated on its own merits.

APPENDIX B

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 84 2381R

UNITED STATES

v.

MICHAEL E. YEAUGER, 287 56 8113
SERGEANT (E-5), U.S. MARINE CORPS

Sentence Adjudged 16 Jan. 1984
Decided 30 June 1987

WILLIAM J. HOLMES, Civilian Defense Counsel.

CAPT DAVID C. LARSON, JAGC, USN, Appellate Defense Counsel.

LT TERRY J. ROMINE, JAGC, USNR, Appellate Government Counsel.

Before COUGHLIN, MIELCZARSKI and DECARLO, JJ.

DECARLO, Judge:

Appellant was convicted by a General Court-Martial (officers & enlisted) of a four day unauthorized absence, three specifications of conspiracy to commit larceny, three specifications of larceny (corresponding with the conspiracy allegations), and one specification of unlawfully receiving and concealing stolen property in violation of Articles 86, 80, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 886, 921, 934, respectively. He was sentenced to twenty years confinement, total forfeitures, reduction to pay grade E-1, and a dis-

honorable discharge. The findings and sentence were approved on review by the convening authority. We originally affirmed both the findings and sentence in this case.[1] United States v. Yeauger, 20 M.J. 797 (N.M.C.M.R. 1985). In that decision, we found, *inter alia,* that a pretrial, unsworn statement of a servicemember who identified the appellant as his co-actor in the larcenies alleged was admissible under the residual hearsay exception embodied in Military Rule of Evidence (MRE) 803(24). This case is now before us upon remand from the Court of Military Appeals 23 M.J. 245, for reconsideration in light of *Lee v. Illinois,* __ U.S. __, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and *United States v. Cordero,* 22 M.J. 216 (C.M.A. 1986), subsequent cases concerning the issue of the admissibility of statements made by criminal accomplices. Finding those cases to be inapplicable to the facts presented in the instant case, we now affirm our original decision.

In *Lee v. Illinois, supra,* the petitioner and co-defendant were charged with committing a double murder and were tried together and convicted at a bench trial at which neither testified. Both Lee and her co-defendant had originally confessed to committing the crimes. The separate confessions given by them to the police factually overlapped to a great extent except for the fact that the co-defendant stated that the killings were planned in advance while Lee's version related that the crimes were the result of an intense argument. In finding Lee guilty of both murders, the trial judge specifically relied upon the co-defendant's earlier confession particularly with respect to his rejection of her claims that she acted either in self-defense or under an intense and sudden passion. The Supreme Court reversed Lee's conviction, holding that the

[1] Pursuant to a recommendation by the Naval Clemency & Parole Board, the Secretary of the Navy reduced the confinement portion of the sentence to ten years.

co-defendant's confession was not reliable enough to warrant its untested admission into evidence against Lee. The Court reasoned that the Confrontation Clause

> is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination . . . such a confession 'is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally . . . More than this, however, the post-arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.' *Bruton v. United States,* 391 U.S. [123] at 141, 88 S.Ct. [1620 at] 1631 (20 L.Ed.2d 476 (1968)] (White, J., dissenting).

106 S.Ct. at 2062.

Likewise in *United States v. Cordero, supra,* the Court of Military Appeals ruled that in a prosecution for child abuse, an inculpatory hearsay statement made to criminal investigators by appellant's wife who had since departed the country could not be admitted as substantive evidence against the appellant under Military Rule of Evidence (MRE) 804(b)(5). In its opinion, the Court stated that "we are unable to allow the use against Cordero of this extrajudicial statement in the preparation of which criminal investigators played a major role, when he has no opportunity to cross-examine the declarant." 22 M.J. at 223.

Underlying both the *Lee* and *Cordero* decisions is the notion that the confrontation clause demands that "when one person accused another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and

must be subject to the scrutiny of cross-examination." *Lee,* 106 S.Ct. at 2062-63. *See also Cordero, supra,* at 223. Both cases highlight the unanimously held belief that "the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). *See also California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). In cases where the hearsay declarant is available and subject to cross-examination, however, the same constitutional pressures do not exist and the need for reliability of the hearsay is logically somewhat lessened although by no means is it lost. *See United States v. Renville,* 779 F.2d 430, 440 (8th Cir.1985); *United States v. McPartlin,* 595 F.2d 1321, 1350 (7th Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). *See also United States v. Barror,* 23 M.J. 370, 372 (C.M.A. 1987); *United States v. Hines,* 23 M.J. 125, 128 (C.M.A. 1986) (cases stressing that where the declarant is not available, the Confrontation Clause requires a degree of reliability high enough so as to be an effective substitute for cross-examination.)

In the instant case the accomplice, SSGT Callahan, testified at the trial and was subject to cross-examination. The constitutional dangers presented in *Lee* and *Cordero,* therefore, are not present in this case and to the extent that those cases are premised upon confrontation clause considerations concerning the introduction of hearsay statements of accomplices, they are inapplicable. At issue is not whether Callahan's oral confession is sufficiently trustworthy to overcome the heavy demands of the Confrontation Clause, but rather whether it has sufficient circumstantial guarantees of trustworthiness to warrant admission under MRE 803(24) where the accomplice was

available and testified at trial. *See Hines, supra,* at 128 (question of admission must be judged separately under confrontation and hearsay standards); *United States v. Powell,* 22 M.J. 141, 145 (C.M.A. 1986) (Everett, C.J., concurring). We hold that it does and that the military judge did not err in admitting it into evidence against the appellant.

During the Fall of 1981 the 22-Area Enlisted Club at Camp Pendleton, California was twice the subject of larceny. During the ensuing investigation, agents from the Naval Investigative Service (NIS) interviewed SSGT Callahan, an assistant manager at the club. In that interview, Callahan confessed to having participated in the larcenies with the appellant, also an assistant manager in the club system. He stated that appellant had initially approached him with a scheme to rob the club. Under the plan, the two were to go to the club in the early hours of the morning, open the safe, take the money and then appellant would handcuff Callahan to a stall in the bathroom. Appellant would then leave with the money and return shortly thereafter to open the club and "discover" Callahan cuffed to the stall and claiming to be the victim of an armed robbery. The money from the theft was to be split between the two after things "cooled off". He stated that he and appellant carried out the plan.

Callahan also related to the agents the facts of the second larceny at the club which had occurred about a month after the first. This plan involved cutting through the club safe with a torch to make it look like an "outside" job. Appellant procured a torch and he and Callahan drove to the club in the early morning hours, let themselves in, and proceeded to cut open the safe and steal the money therein. Accoding to Callahan, he did not receive his full share of the money taken, however, because of "heat" from the NIS investigation of the first larceny. When appellant was

transferred to the east coast, he gave the money to his parents until things cooled off. The money was eventually paid to Callahan by appellant's parents by means of a check for $800.00. Callahan retracted this confession shortly after it was made.

At appellant's trial, the Government sought to introduce Callahan's confession pursuant to MRE 803(24) through the testimony of the NIS agent who had conducted Callahan's interview. Under MRE 803(24), statements not covered by any specific exception but having equivalent circumstantial guarantees of trustworthiness are admissible if the court finds (1) that the statement is offered to prove a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence reasonably available, and (3) where the admission of the statement would serve the general purposes of the rule and the interests of justice. At issue here is whether Callahan's oral confession has sufficient circumstantial guarantees of trustworthiness.[2]

We find that it does in this case for several reasons, the most important being that Callahan was present at trial and was subject to cross-examination. Although he testified, contrary to his earlier confession to the NIS, that he and appellant did not plan or participate in the club larcenies, he was nonetheless given the opportunity to explain to the members why his story had changed since the NIS interview. This fact alone provides significant indicia of trustworthiness. *See United States v. Leslie,* 542 F.2d 285, 290 (5th Cir.1976). *See also United States v. Renville,* 779 F.2d 430, 440 (8th Cir.1985); *Vogel v. Percy,* 691 F.2d 843 (7th Cir.1982); *United States v. Iaconetti,* 406 F.Supp.

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[2] We agree with the finding in our original opinion that the three remaining criteria for admission under the rule are met in this case. *See* 20 M.J. at 800.

554, 559 (E.D.N.Y.1976), *aff'd* 540 F.2d 574 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). The fact that Callahan testified also satisfies the main concern of both the Confrontation Clause and the hearsay rule which is the lack of any opportunity to cross-examine the absent declarant. *See Lee, supra; Anderson v. United States,* 417 U.S. 211, 220, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974); *Renville, supra,* at 440; *United States v. Bohr,* 581 F.2d 1294, 1304 (8th Cir.1978). *See also* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(24)[01], at 803-375 (courts are willing to admit hearsay evidence where the declarant is available and subject to cross-examination, and the hearsay statement was not the product of the dangers against which the rule seeks to guard.) In cases such as this where the hearsay declarant is available and subject to cross-examination, the degree of reliability necessary for admission under MRE 803(24) is reduced primarily because of the opportunity for the declarant to explain why a particular statement is or is not accurate. *See Renville, supra,* at 440; *United States v. McPartlin,* 595 F.2d 1321, 1350-51 (7th Cir. 1979), *cert. denied,* 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). Callahan's testimony allowed the members to judge the accuracy of his confession and the motives he had for making it. Thus the presumption of unreliability that normally attaches to accomplice confessions admitted against a co-actor without the benefit of cross-examination and which formed the basis for the Supreme Court's decision in *Lee* is overcome where the declarant is available and speaks in open court. *See United States v. Lee,* 106 S.Ct. at 2062-63 ("accomplice accusation is presumptively suspect and *must* be subjected to the

scrutiny of cross-examination.")[3] As Professor McCormick has aptly noted,

> the witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. It will go hard, but the two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and thus reveal which is the true story and which is the false.

McCormick, *Evidence* § 39 at 75.

We also find it significant that Callahan admitted making the statement to the NIS agents and, in fact, confirmed that what the agents testified to at trial was an accurate version of his statements made to them. *See Leslie, supra,* at 290-91; *United States v. Powell,* 22 M.J. 141, 145 (C.M.A. 1986). Although he testified that these earlier statements were lies resulting from the fear of imprisonment and the threats of an unknown person who confronted him in a shopping mall and told him to implicate the appellant or risk the life of his girlfriend and daughter, this simply created a question of witness credibility well within the province of the members to decide.[4] We agree with the oft-quoted observation by Judge Learned Hand that "if from all the jury sees of the witness, they conclude

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[3] We stress, however, that the fact of cross-examination does not *per se* satisfy the trustworthiness requirements of the residual hearsay rules, although it is a strong factor weighing in favor of reliability. *See United States v. Hines,* 23 M.J. 125, 128 (C.M.A.1986). *Cf. United States v. Powell,* 22 M.J. 141, 145 (C.M.A.1986) (Everett, C.J., concurring).

[4] The patent incredibility of appellant's in-court testimony and the improbable reasons he gave for changing his story are further indicia of the reliability of his earlier confession. *United States v. Powell,* 22 M.J. 141, 145 (C.M.A.1986).

that what he says now is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court." *DiCarlo v. United States,* 6 F.2d 364, 368 (2d Cir.1925). *See also Leslie, supra.*

It is also noteworthy that Callahan's oral confession to the NIS was very detailed and specific, relating facts which would only be known by one actually involved in the offenses. Further, his statement was strongly corroborated. The testimony of PVT Yeauger, appellant's wife, was, for all practical purposes, identical to Callahan's statement. According to PVT Yeaguer, she and appellant purchased a set of handcuffs just prior to the first larceny. She was present when the money was split up, and she heard appellant and Callahan talking about how appellant had handcuffed Callahan to a bathroom stall to make the job look like a robbery. Prior to the second larceny appellant purchased a torch and approached Callahan with the idea to use it to cut into the club safe. Callahan was initially reluctant to do so, but later agreed. After the larceny, appellant's parents were given Callahan's share of the money for safekeeping. She further stated that Callahan received his share eventually when appellant's parents tendered him a check for $800.00

Police reports on the larcenies also confirm the veracity of Callahan's confession. According to the reports, the first larceny was reported by the appellant who had gone to open up the enlisted club for the day and had found Callahan handcuffed to the bathroom stall. Callahan claimed to have been robbed by masked gunmen. The report on the second larceny indicated that the safe was cut open with a torch. Additionally, evidence was produced to show that appellant's parents did indeed pass a check for $800.00 to Callahan.

In short, we find that there is ample evidence to demonstrate sufficient circumstantial guarantees of trustworthiness surrounding Callahan's oral confession to the NIS to warrant admission of that statement against the appellant under MRE 803(24). The evidence and testimony presented, coupled with Callahan's own testimony "strongly suggest that the declarant's perception, memory, narration, and sincerity concerning the matters asserted [in the NIS interview] are trustworthy," *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir.1979), and they provided a meaningful basis for assessing both the candor of the declarant and the accuracy of the statement. *See United States v. Barror*, 23 M.J. 370, 372 (C.M.A.1987). Therefore we find that the military judge below did not abuse his discretion in admitting the extra-judicial statements under MRE 803(24).

Accordingly, upon reconsideration, the findings and sentence as approved on review below are affirmed.

Senior Judge COUGHLIN and Judge MIELCZARSKI concur.

APPENDIX C

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 84 2381

UNITED STATES

v.

MICHAEL E. YEAUGER, 287 56 8113,
SERGEANT (E-5), U.S. MARINE CORPS.

Sentence Adjudged 16 Jan. 1984
Decided 19 June 1985

CDR David C. Larson, JAGC, USN, Appellate Defense Counsel.

William J. Holmes, Civilian Defense Counsel.

LCDR Jeffrey S. Sawtelle, JAGC, USN, Appellate Government Counsel.

LT William C. Little, Jr., JAGC, USNR, Appellate Government Counsel.

Before GREGORY, MITCHELL and BARR, JJ.

BARR, Judge:

Tried by general court-martial composed of officer and enlisted members, appellant was convicted, contrary to his pleas, of unauthorized absence from 29 August to 1 September 1983, three (3) counts of conspiracy to commit larceny, three (3) counts of larceny (corresponding to the

conspiracy allegations), and a single specification of unlawfully receiving and concealing stolen property, in violation of Articles 86, 80, 121, and 134. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 880, 921, 934, respectively. The sentence adjudged, which extended to a dishonorable discharge, confinement for 20 years, total forfeiture of pay and allowances, and reduction to pay grade E-1, was approved on review below.

Seven assignments of error have been addressed by appellant to this Court for consideration. We decide Assignments III through VI adversely to appellant and reject them without comment. Disposition of Assignments II and VII depends, in part, on the merit and resolution of the first error assigned.

I

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE THE ORAL UNSWORN STATEMENT OF SERGEANT E.D. CALLAHAN, USMC, UNDER MIL.R.EVID. 803(24).

The facts essential to resolution of this issue can be briefy stated. Appellant and one Sergeant (SGT) Callahan were on the management staff of the 22 Area Enlisted Men's Club, Camp Pendleton, in September and October 1981, during which time two larcenies of that club occurred. Initial suspicion settled upon SGT Callahan, but no charges followed. Appellant and his wife, also a servicemember, were subsequently transferred to the Marine Corps Air Station, New River area for duty. In May and July 1982, larcenies from club facilities at New River occurred. As a result of statements given by appellant's wife to the Naval Investigative Service (NIS), appellant and SGT Callahan were implicated in the 22 Area Club thefts. SGT Callahan, upon interview by NIS, ultimately con-

fessed to his part in the latter thefts and identified appellant as his co-actor. SGT Callahan refused to have his oral confession reduced to writing, and, thus, the confession was not made under oath. Prior to, and during, his court-martial for his part in these thefts, SGT Callahan recanted his confession and litigated its admissibility by way of a motion to suppress. The motion was denied, the confession was admitted, and SGT Callahan was convicted of the September and October thefts from the 22 Area Club.

At appellant's trial, the Government revealed that it would seek to have the NIS agents who took SGT Callahan's confession testify as to the substance of that confession and obtain admissibility of the agents' testimony as substantive evidence on the merits under Rule 803(24), Mil.R.Evid.—the residual rule. The trial court took testimonial evidence, which included that of the two NIS agents, appellant's wife, and SGT Callahan, who testified in accordance with his recantation, on the issue of whether to admit the testimony of the agents during trial on the merits. In essence, the military judge conducted a complete hearing on the voluntariness and admissibility of SGT Callahan's confession, wherein the Government was required to meet the burdens precedent to admissibility which obtain in military practice whenever a suppression motion relating to a confession is litigated. SGT Callahan's testimony on the motion is particularly significant. He stated that the testimony of the NIS agents, which recited what he purportedly admitted to them, accurately reflected the account of events and facts he had provided NIS during the confession interview. Other evidence offered on the motion, including the testimony of appellant's wife, essentially corroborated the facts admitted in SGT Callahan's confession. The military judge, subject to certain restrictions not now relevant, ruled that

he would permit the NIS agents to testify as to the facts admitted in SGT Callahan's confession and, thus, the implication of appellant in the thefts of the 22 Area Club, and would authorize the use and consideration of such testimony as substantive evidence in appellant's trial. We conclude that the military judge was correct in his ruling and that the essential findings entered on the motion are supported by the evidence of record.

Rule 803(24), Mil.R.Evid., provides, in pertinent part, that the following type of evidence will not be excluded by the hearsay rule:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Looking first to subdivisions (A), (B), and (C) of the Rule, we conclude that each criterion was met in this case. The confession of SGT Callahan to the NIS agents related the *modus operandi* of the offenses and the subsequent cover-ups, the identity of the *res* of the offenses, and the criminal actions of both appellant and the relator leading to the consummation of the offenses, all of which were material facts relating to the crimes alleged. The testimony of the agents was but the vehicle which presented this confession and the material facts recited therein to the triers of fact. Similarly, SGT Callahan's confession, as related by the testimony of the NIS agents, was indeed the most

probative evidence available on these material facts. The corroborative evidence offered via the testimony of appellant's wife was, if believed, certainly material to the issues of fact being litigated. Her credibility as a witness, however, was known to be subject to severe impeachment on the grounds of bias and malice against her husband and prior inconsistency. Thus, the statement of SGT Callahan was not only the most probative evidence available as to the material facts admitted by him, but also necessary corroboration to the testimony of appellant's wife. Finally, admitting the statement of SGT Callahan, if it be found sufficiently trustworthy, would, under the facts of this case, further the purposes of the rules as set forth in Rule 102, Mil.R.Evid.—particularly, the truth-finding process. We thus concur with determination of the military judge that each of the conditions set forth in (A), (B), and (C) of the Rule 803(24), Mil.R.Evid., was met.

It is, of course, the "trustworthiness" requirement of Rule 803(24) which is central to the issue addressed. We thus set forth, initially, the parameters which guide, and upon which is focused, our consideration of this threshold requirement.

We state at the outset that we read the quoted rule as requiring that the proponent demonstrate that the evidence to be offered for admission possesses *only* "equivalent", not "exceptional", circumstantial guarantees of trustworthiness. Thus, if the standards governing trustworthiness that are embraced within the specific hearing exceptions are likewise present in the evidence offered under the residual rule, such evidence should be deemed to meet the threshold requirement of "equivalent circumstantial guarantees of trustworthiness" of the rule.

It is commonly held that hearsay evidence is not admissible because one or more of the important testimonial

requisites incident to trial, and, thus, trustworthiness of the hearsay evidence, are lacking. Those requisites are that the witness testify under oath, in the presence of the trier of fact, and be subject to contemporaneous cross-examination. *See Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In addition, in a criminal case, violation of the Sixth Amendment right of an accused to confront the witnesses against him stands as a separate—though ofttimes interrelated—ground for exclusion of hearsay evidence.

Another consideration presented by this case on the trustworthiness requirement of Rule 803(24) is the propriety—or lack thereof—of the judging of the credibility of SGT Callahan and the NIS agents, by the military judge, in determining whether this requirement was met. A judgment on the credibility of witnesses is normally viewed to be the province of the triers of fact. This judgment, however, is one related only to balancing the weight to be given to certain evidence. Before evidence can be weighed, it must be admitted. The military judge, who must ultimately rule on the admissibility of evidence, must, of necessity, weigh the credibility of witnesses in reaching this ruling. His determination is binding on the triers of fact only to the extent that they must consider the admitted evidence on the issue for which it is presented. It is certainly not binding on, nor does it influence, the triers of fact in resolving what weight, if any, is to be given to such evidence. We conclude it to be not only appropriate, but also essential, that the military judge consider, in determining the trustworthiness requirement, those factors bearing on the reliability and credibility of the declarant of a hearsay statement as well as the relator of that statement.

We finally refer to the decision in *United States v. Whalen,* 15 M.J. 872 (ACMR1983), in which Judge

Foreman, speaking for the Court, identified four (4) criteria for examination on the issue of trustworthiness of a proffered statement. We herein adopt, and apply, these incidents of trustworthiness: (1) presence of the hearsay declarant at trial and subject to cross-examination; (2) similarity of the hearsay declaration to specifically defined hearsay exceptions; (3) the circumstances surrounding the making of the hearsay declaration support a finding of trustworthiness; and, (4) other evidence, independent of the hearsay declaration, corroborates the truth of the facts admitted within the declaration.

We now apply the various standards and criteria formulated above to the specific facts of this case. Turning first to the examination suggested by *Whalen,* we find all four criteria present. SGT Callahan, the hearsay declarant, was present at appellant's trial and subject to examination by the defense. Furthermore, the NIS agents, whose credibility was crucial to the issues of both admissibility and weight, were also subject to cross-examination. SGT Callahan's admission was similar to a recognized exception to the hearsay rule, Rule 804(b)(3), governing declarations against penal interest, and to a statement which is treated as non-hearsay under Rule 801(d)(1)(A), inconsistent prior statements. The circumstances attending the giving of the statement by SGT Callahan suggest its trustworthiness. The evidence on this aspect of the trustworthiness requirement was fully litigated by a suppression motion at appellant's trial in which the military judge judged the admissibility of SGT Callahan's confession by the same standards that he would have applied had the testimony of the NIS agents been offered against SGT Callahan at his trial. If the declaration of SGT Callahan and the testimony of the NIS agents were sufficiently trustworthy to meet the requirements of Rules 304 and 305, Mil.R.Evid., if litigated in a trial of the

declarant, the same finding of trustworthiness arguably pertains where the declaration is offered in a different proceeding against a co-actor. As to the last criterion, we find sufficient corroborating facts in the evidence admitted, without consideration of SGT Callahan's confession, to support the truth of the matters admitted in that hearsay declaration. It further makes sense that if the evidence is sufficient to meet the corroboration requirement of Rule 304(g), Mil.R.Evid., were SGT Callahan the accused, that same evidence would satisfy the factual corroboration ingredient as applied to trustworthiness.

We concur completely with the military judge's estimate of SGT Callahan's credibility as it relates to the recantation of his confession. The "cloak-and-dagger" web of intrigue spun by SGT Callahan is patently incredible and unworthy of belief. The "tale" of mystery, in fact, defies belief. We consider the recantation, as well as the testimony of SGT Callahan on the motion, to be the epitomic lie. His recantation testimony was such a farcical assault on basic ideas of veracity that it, though offered to explain away his confession, served instead to support its truth. The credibility of the NIS agents was, as previously noted, supported by SGT Callahan, for he admitted that he indeed related to the agents those facts to which they testified. Thus, the military judge properly considered the credibility of the witnesses and their declarations—both at the time of their making and at the time of trial—as factors in determining the trustworthiness of the hearsay declaration. Our judgment of the credibility of the NIS agents against that of SGT Callahan is in consonance with that of the military judge.

There is no confrontation clause violation. SGT Callahan, the hearsay declarant, appeared at appellant's trial as a witness, and unlimited opportunity was afforded

appellant and his counsel to attack the declaration and support Callahan's in-court testimony. This is sufficient to pass constitutional muster. *See California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Finally, the testimonial requirements, which, when absent, call for exclusion of evidence on hearsay grounds, are abundantly present in this case. The critical witnesses on the issue—both the declarant of the statement and the relators of same-were present at trial, testified under oath and in the presence of the fact-finders, and were subject to examination by both parties to the trial. That these requirements took place at trial, and not at the time of the making of the declaration, is of no moment because the purpose for which they exist as indicia of trustworthiness was fully met.

We, therefore, reject the first error assigned and hold that, under the specific circumstances of this case, the oral unsworn and hearsay declaration of SGT Callahan was properly admitted under Rule 803(24), Mil.R.Evid.

II

APPELLANT'S GUILT OF CHARGES II, III AND IV AND THE SPECIFICATIONS THEREUNDER WAS NOT PROVED BEYOND A REASONABLE DOUBT.

Having determined the out-of-court statement of SGT Callahan, as related through the testimony of the NIS agents, to be admissible as substantive evidence, we find the evidence of record taken as a whole proves appellant's guilt beyond reasonable doubt of each offense of which he stands convicted.

III

APPELLANT'S SENTENCE TO 20 YEARS CONFINEMENT IS UNDULY SEVERE AND DISPROPORTIONATE TO THE OFFENSES CONSIDERING: (1) THE ABSENCE OF A PRIOR DISCIPLINARY RECORD; (2) THE AMOUNT OF MONEY INVOLVED; (3) THE FACT THAT NO VIOLENCE WAS INVOLVED; AND (4) THE FACT THAT THE ACCOMPLICE (AND PRINCIPLE ACTOR) FOR TWO OF THE OFFENSES RECEIVED A SENTENCE TO CONFINEMENT OF ONLY 5 YEARS (*UNITED STATES V. YEAUGER*, No. 83 3901 (NMCMR 19 OCTOBER 1983)) AND THE ACCOMPLICE FOR THE OTHER TWO OFFENSES RECEIVED A SENTENCE TO CONFINEMENT OF ONLY THREE MONTHS (*UNITED STATES V. CALLAHAN*, NO. 84 1053 (NMCMR 19 JULY 1984)).

We could not disagree more. While we make no comment on the sentence awarded SGT Callahan, we have no hesitation in concluding that a sentence to 20 years confinement is appropriate for the master-mind of two larcenies from the Government totalling $11,410.55, the co-actor in another larceny from the Government of $4628.74, and the receiver and concealer of $7120.95 stolen from the Government. We have been provided with a decision of the Secretary of the Navy, acting pursuant to Article 74(a), UCMJ, 10 U.S.C. § 874(a), which, in consonance with a recommendation of the Naval Clemency and Parole Board, reduced the period of appellant's confinement to 10 years. As we find the sentence adjudged appropriate, we see no reason why this Court should now add to the clemency already granted this proven thief.

Accordingly, the findings and sentence as adjudged on review below are affirmed. The court-martial order, in the summarization of offenses, erroneously states the amount alleged in specification 1 of Charge II. A corrected order should be issued.

Senior Judge GREGORY and Judge MITCHELL concur.

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